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In The

Supreme Court of the United States

October Term 1945

No. 1071

DELLA HOOK, Administratrix of the estate of Jacob Hook, Deceased,
Petitioner,

v.

NATIONAL BISCUIT COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

BERNARD J. GALLAGHER
Union Trust Building
Washington, D. C.

ROBERT H. MOORE
504 Broadway
Gary, Indiana

WILLIAM GRIMES

GERALD O'BRIEN
135 South LaSalle Street
Chicago, Illinois

Attorneys for Respondent

WILSON & EVANS PRINTING CO. - 311 6003 - WASHINGTON 1, D. C.

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OPINION BELOW

The opinions below are reported at 150 Fed. (2d) 184, on the first appeal; at 68 Fed. Supp. 740 for the District Court's memorandum opinion following the reversal on the first appeal; and at 158 Fed. (2d) 86, on the second appeal.

JURISDICTION

Jurisdiction for review is Section 240 (a) of the Judicial Code, as amended February 13, 1925.

QUESTION PRESENTED

Whether the District Court was in error in entering judgment in respondent's favor, without a new trial, after a general reversal by the Circuit Court of Appeals of a verdict and judgment in petitioner's favor, which action of the District Court was affirmed by the Circuit Court on a second appeal.

STATEMENT

This action was brought originally in the District Court of the United States for the Northern District of Indiana, Hammond Division, to recover damages for the alleged wrongful death of petitioner's decedent while obtaining a load of bricks at a brick kiln owned and operated by respondent. The jury in the District Court returned a verdict for petitioner in amount of Ten Thousand Dollars ($10,000.00), upon which the court entered judgment. Respondent filed a motion for new trial and a separate motion for judgment non obstante veredicto, both of which were overruled. Respondent appealed. The judgment was reversed on June 8, 1945, with written opinion; 150 Fed. (2d) 184 (R. 19).

Petition for rehearing was denied and the mandate of the Circuit Court was filed with the District Court. Thereafter the District Court entered judgment for Respondent. Petitioner appealed, contending that because the mandate did not embody a specific direction to enter judgment for respondent, a new trial should have been ordered.

The Circuit Court affirmed (R. 37) saying that in the District Court, after the filing of the mandate, petitioner made no offer to produce any new evidence not before heard; that the reversal by the Circuit Court of the verdict and judgment in petitioner's favor had been upon the ground that, as a matter of law, the proof failed to sustain

the negligence alleged in the complaint. The Circuit Court came to this conclusion after reviewing the evidence in detail.

ARGUMENT

Conflict with Precedents of this Court

Petitioner contends that the action of the Circuit Court is in conflict with precedents of this court, citing *Slocum v. New York Life Insurance Company,* 228 U. S. 364; *Baltimore and Carolina Line v. Redman, Inc.,* 295 U. S. 654; *Montgomery Ward and Co. v. Duncan,* 311 U. S. 243 and *Rodgers v. Hill,* 289 U. S. 582. The cases cited do not support this contention.

Petitioner contends that the ruling in *Slocum* requires a new trial in this case. This court, however, in *Baltimore and Carolina Line v. Redman, Inc.,* distinguished the *Slocum* case and held against the same contention that is now made by petitioner.

In the *Slocum* case there was a general verdict for plaintiff over defendant's motion that a verdict for it be directed. On appeal, the circuit court examined the evidence, concluded it was insufficient to support the verdict, and on that basis reversed the judgment for plaintiff and directed that judgment be entered for defendant. The Supreme Court ruled that the judgment for the defendant was an infraction of the Seventh Amendment, and that a new trial should be had.

But in distinguishing the *Slocum* case in *Baltimore and Carolina Line v. Redman, Inc.,* this court said,

> "It therefore is important to have in mind the situation to which our ruling applied. In that case *(Slocum)* the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of evidence or of any other

matter; and the verdict for the plaintiff was taken unconditionally and not subject to the court's opinion on the sufficiency of the evidence."

• • • • •

"A very different situation is disclosed in the present case *(Baltimore and Carolina Line v. Redman, Inc.)*. The trial court expressly reserved its ruling on the defendant's motion to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by this court."

• • • • •

"The Court of Appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and, therefore, that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal."

"In view of the common law practice (of taking verdicts subject to the ultimate ruling of the court on questions of law reserved) and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor."

A judgment of dismissal on the merits instead of for a new trial was ordered. This case seems to refute specifically the petitioner's contention that upon a general reversal a new trial follows automatically. Indeed the Circuit Court in the case just cited reversed the District Court with a direction in the mandate for a new trial. The Supreme Court held this direction was error and

that the direction should have been for dismissal on the merits.

On page 11 of her petition the petitioner states that the Circuit Court of Appeals decided in the instant case that "there was error of law at the trial" and "also that the evidence was insufficient." The opinion of the Circuit Court at 150 Fed. (2d) 185, and repeated on the second appeal at 158 Fed. (2d) 86, is that the reversal was solely upon the ground that the plaintiff's proof was insufficient as a matter of law to sustain the cause of action. There was no reversal for any error of law at the trial which could have been remedied by a new trial.

To set the case automatically for trial again, after reversal, as petitioner contends should have been done, would nullify completely the stated purpose of Rule 50 (b), which is to avoid unnecessary retrials. The record in this case shows that after remand the plaintiff made no offer to produce any evidence not before heard (R. 38). She failed to demonstrate to the District Court that her case on retrial would be any different than it had been the first time. The Circuit Court's hint that she should have done this is what she speaks of as the "trial within a trial" at record page 5. Petitioner wanted a new trial without any showing on her part that she was entitled to it.

It is clear that this court has taken the position, particularly in *Rodgers v. Hill*, 289 U. S. 582, that the District Court is expected, upon remand, to exercise its own sound discretion in determining whether the plaintiff should be allowed to file additional pleadings, vary or expand the issues, and, presumably, to determine from disclosures made by the plaintiff whether she can bring forward new evidence that would enable her to present a stronger case if given an opportunity to try it again.

The petitioner urges that *Rodgers v. Hill* prevents the District Court, in the absence of express direction from the Circuit Court, entering a judgment of dismissal of the complaint. But that case was prior to enactment of the Rules of Civil Procedure and does not purport to consider appropriate procedure under Rule 50 (b). What is appropriate procedure under Rule 50 (b), is, however, discussed by this Court in *Montgomery Ward and Company v. Duncan,* 311 U. S. 243.

The situation involved in the *Montgomery Ward* case was this: In a personal injury case the jury returned a verdict for plaintiff on which judgment was entered. Defendant filed a motion in the alternative (1) for judgment non obstante veredicto, or (2) for a new trial. The District Court considered the motion; held there was no evidence of negligence that would hold the defendant and entered judgment n. o. v. for defendant, but did not act upon the motion for new trial. The Circuit Court reversed, holding the evidence sufficient to make a case for the jury, and remanding the cause with instructions to the District Court to enter judgment on the verdict in favor of the plaintiff and it overruled the defendant's contention that the cause should be remanded with leave to the trial court to dispose of the motion for new trial. The Supreme Court took the case for the purpose of outlining the appropriate procedure under Rule 50 (b) in such circumstances and held as follows:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n. o. v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the reversal of judgment n. o. v. and error of law in the trial, as heretofore."

The Supreme Court then ordered that the judgment below be modified to provide that the cause be remanded to the District Court to hear and rule upon the motion for new trial. This case does not, as the petitioner contends here, support her proposition that reversal by the Circuit Court, without a specific direction to the District Court to enter judgment for the defendant, automatically requires a new trial.

The *Montgomery Ward* case does nothing more than to outline a course of procedure for the lower courts where the District Court judge is presented with alternate motions for judgment notwithstanding the verdict or for a new trial and fails to rule upon the latter motion.

Conflict Among Circuit Courts of Appeal

The petitioner contends that the Circuit Courts of Appeal are in conflict with respect to the application of Rule 50 (b) of the Rules of Civil Procedure. The authorities she cites do not support her contention. She bases her contention primarily upon *Illinois Power and Light Corporation v. Hurley,* 49 Fed. (2d) 681, but that case was before the Rules of Civil Procedure and does not purport to interpret or apply Rule 50 (b). Furthermore, if the case were closely read it would disclose that the reason it was sent back for new trial is that the court concluded, page 690:

> "A careful study of the whole evidence satisfies that the issue was one that *could not be determined as a matter of law.* There were no physical nor demonstrated facts or scientific principles from which it could be said that the plaintiff's contention could not be true; * * * at least, reasonable men might well have reached different conclusions therefrom. The plaintiffs developed a theory upon which the actionable negligence of the power company was predicated, and that theory was supported by tangible and substantial evidence."

The *Illinois Power* case, therefore, is entirely dissimilar to the instant case, wherein the Circuit Court decided as a matter of law upon both appeals that the plaintiff had failed to establish the case alleged in its complaint. When the instant case was remanded, therefore, and the District Court afforded plaintiff an opportunity to disclose whether it had new and additional evidence, and plaintiff was unable to take advantage of that opportunity, then the only appropriate action for the District Court was to enter judgment in the defendant's favor. This action of the District Court is in strict conformance to Rule 1 of the Rules of Civil Procedure which requires that the Rules

> "Shall be construed to secure the just, speedy, and inexpensive determination of every action."

Petitioner contends that three opinions which support her petition have been rendered by the Circuit Court of Appeals for the Fifth Circuit since the *Hurley* case, but upon examination of the three opinions we find that they adhere to no fixed principle of law or procedure but, to the contrary, their decisions are patterned upon the exigencies of each case; they are dissimilar as between themselves and dissimilar to the *Hurley* case, the doctrine of which they are alleged to have followed.

The Circuit Court of Appeals in the instant case has already distinguished the first of these three cases, *Madden Furniture Company,* 127 Fed. (2d) 837, pointing out that all that was before the Circuit Court there were the errors as to the admission of evidence, as to the judge's charge, and as to the refusal of motions for a new trial. In other words, matters which were remedial upon a new trial. Such was not the situation in the instant case where the matter before the Circuit Court was the denial of the defendant's motion for judgment non obstante veredicto. Upon the Circuit Court's finding that plaintiff had failed

as a matter of law to make out a case it then became the duty of the District Court to take action equivalent to granting defendant's motion for judgment n. o. v. after the verdict, and enter judgment for the defendant, there being no procedural errors such as the court dealt with in the *Madden* case.

In *Roth v. Hyer,* 142 Fed. (2d) 227, the interpretation or application of Rule 50 (b) was not before the court because that was a trial by the judge and not by the jury. What was before the court was the procedure under Rule 38 (b) and (d) and under Rule 39 (d). The plaintiff in the case had failed to demand a jury trial within the required time. The judgment for the defendant was reversed and remanded for further and not inconsistent proceeding. On the retrial the judge limited the case to the amount of damages. The Appellate Court held this was error and that the case should go back for trial upon all of the issues, because of the peculiar character of the case. The opinion does state a general principle, which can be applied advantageously in the instant case; namely, that:

> "In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principles of law disclosed in the opinions of the Appellate Court, *which must be regarded as the law of the case on the second trial.*"

The law of the instant case was, clearly enough, that the plaintiff had failed as a matter of law to prove the case alleged in her complaint. While there was no second trial the Appellate Court had an opportunity to review the action of the District Court in entering judgment for respondent following receipt of the mandate, and affirmed it as having correctly construed the opinion and mandate. This action became the law of the case and prohibited any action in the case other than a judgment in the defendant's favor.

The answer to petitioner's point that there was no specific direction in the Circuit Court's mandate to enter judgment for the defendant is that the Circuit Court reviewed the District Court's action in entering the judgment on the second appeal and approved it, saying the District Court correctly construed the opinion and mandate (R. 38).

In the case of *Fleniken v. Great American Indemnity Company,* cited by petitioner, the question before the court was whether appellants were entitled to notice and an opportunity to be heard upon the matter of entering judgment upon the mandate. The case dealt with the application of Rule 50 (b) and with a situation where the Court had overruled the defendant's motion for directed verdict and also overruled the plaintiff's motion for new trial. On appeal the case was reversed by the Appellate Court which held that the reversal and remand

> "for further and not inconsistent proceeding, did not reinstate the motion of defendant for a directed verdict and, in the alternative, for a new trial, which motion had been overruled before the appeal was taken. It was within the discretion of the court below to allow that motion to be renewed and to rule on it, but this should not have been done without giving the parties a hearing."

It appears from this case, therefore, that all the court ruled upon was the right of the plaintiff to have notice of action proposed by the defendant to be taken in the District Court after receipt of the mandate of the Circuit Court.

None of the cases cited by petitioner support her contention that the absence from the mandate of a specific direction to the lower court to enter judgment for defendant automatically requires a new trial.

Departure in Procedures

The petitioner devotes a section of her petition to alleged departure in procedure. One would assume that a necessary preface to this discussion would be a definition of the appropriate procedure that should have been followed and then a specification of the departures. No such definition is set out and we think, therefore, we can proceed upon the assumption that there is none. Our first impression of this part of the petitioner's brief is correct, namely, that she is adopting to her argument whatever convenient generalities are at hand.

For example, she remarks upon the absence from the mandate of a specific direction to enter judgment for the defendant; upon her contention that the motion for judgment n. o. v. was not reinstated by the reversal regardless of what may be implied in the mandate. We think it implicit from the ruling of the Circuit Court that the plaintiff had failed as a matter of law to prove her case, and from the fact that the Circuit Court ordered a reversal without qualification, no other action could have been taken by the District Court than to enter the judgment for the defendant. We do not see the point of the petitioner's contention that the motion for judgment n. o. v. was not reinstated by the reversal. The memorandum opinion of the District Court (R. 34) shows that the defendant moved for judgment *on the mandate* and this is the judgment that was entered by the District Court.

The memorandum opinion does not purport to reinstate the motion for judgment n. o. v., unless that is the implied effect of the District Court's ruling. In any event, it does not seem to us that the matter involved is one of reinstatement of this motion. It is simply the taking of equivalent action, *Baltimore & Carolina Line v. Redman*, supra, namely, the correction of the error of the District Court in failing to grant the motion. If this action on the part of the District Court necessitates reinstatement

of the defendant's motion for judgment n. o. v. then it is clearly implied that the motion was reinstated, otherwise the mandate of the Circuit Court is unenforceable.

A portion of this part of the petition is devoted to a brief reargument of the evidence that was considered by the Circuit Court. It is unnecessary to devote any attention to this phase of the petitioner's presentation.

In the concluding paragraph of this section of the petition the petitioner indulges in one final sophism, namely, that the plaintiff must impeach a verdict in his favor to insure against a general reversal. How this would insure against a general reversal is not clear. There would be nothing to prevent the Appellate Court on an appeal which involved an appeal by the defendant from a ruling of the District Court denying a motion for judgment n. o. v., in which appeal there was also involved a motion by the successful plaintiff for a new trial, from reversing the verdict and judgment in the plaintiff's favor, denying his motion for new trial and ordering a judgment entered in the defendant's favor.

Erroneous Construction of Rule 50 (b)

We agree with the petitioner's belief that a primary purpose of Rule 50 (b) is to afford the trial judge an opportunity for more mature consideration of motions for directed verdict or for new trial, and the advantage to be gained from observing the action of the jury; that one purpose of this rule is to prevent, if possible, unnecessary and undeserved re-trials. We do not, however, concur in petitioner's insinuation that the rule has been distorted in this case; nor do we feel that the purpose of the rule ever will be prostituted to "the prevention of re-trials—whether meritorious, necessary or otherwise—depending upon the pressing nature of the particular court's calendar at the time the problem arises," having ourselves too much respect for the fairness and integrity of the judiciary.

The Seventh Amendment

The concluding section of the petition for certiorari refers in the abstract to the constitutional right of trial by jury. We refer to the reference of the petitioner's as abstract. It can only be so because she has already had her trial by jury, at which, the Circuit Court held, she was unable to make out a case as a matter of law. While affirming the right of trial by jury there must, nevertheless, come a time when unmeritorious law suits can be ended. This, we understand, is one of the working attributes of Rule 50 (b); to prevent unwarranted retrials.

CONCLUSION

The decision below is clearly correct and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

BERNARD J. GALLAGHER
Union Trust Building
Washington 5, D. C.

Attorney for Respondent